

GCD

Gardner Carton & Douglas

Thomas J. Dougherty, Jr.
202/230-5164
tdougherty@dc.gcd.com

1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005-3317

Tel 202 230 5000 | Fax 202 230 5300
www.gcd.com

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January 6, 2005

Via Hand Delivery

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

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JAN - 6 2005

Federal Communications Commission
Office of Secretary

Re: WIRELESS TELECOMMUNICATIONS BUREAU,
BROADBAND DIVISION

Supplement to Petition for Reconsideration of Dismissal of
Application for Modification of ITFS Station
KT85 (BMPLIF-19950915HW); WT Dkt. 03-66

Dear Ms. Dortch:

Transmitted herewith, on behalf of The School Board of Miami-Dade, Florida, is an original and eleven copies of its supplement to its petition for reconsideration of the dismissal of its above-referenced application. This application was dismissed pursuant to paragraph 263 of the *Report and Order and Further Notice of Proposed Rulemaking*, released on July 29, 2004, *In the Matter of Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, WT Docket No. 03-66 (the "*Report and Order*"). As this involves a decision in that rule making proceeding, we are also filing this reply electronically.

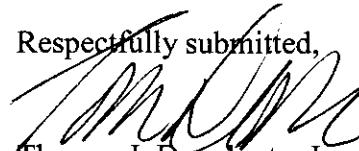
This supplement directs the Commission to a bureau decision that is dispositive of an issue raised in this proceeding. The result is that the Commission staff will be spared the time otherwise required to research, consider and decide the issue, and any chance of inconsistent decisions can be avoided. Accordingly, the consideration of this supplement would serve the public interest and, to the extent required by Rule 1.106, leave to file this supplement is requested and should be granted. Moreover, this supplement should not be considered late as the dismissal of the above-referenced application occurred as a part of the *Report and Order* and petitions for reconsideration of it are not yet due.

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Ms. Marlene H. Dortch
January 6, 2005
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Please contact the undersigned if you having any questions concerning this submission.

Respectfully submitted,



Thomas J. Dougherty, Jr.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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JAN - 6 2005

Federal Communications Commission
Office of Secretary

In the Matter of Application of)
)
THE SCHOOL BOARD OF MIAMI-)
DADE COUNTY, FLORIDA)
)
For Authorization to Modify Facilities)
of ITFS Station KTB-85, Miami, Florida)

File No. BMPLIF-19950915HW

Directed To: The Commission

**SUPPLEMENT TO
PETITION FOR RECONSIDERATION**

THE SCHOOL BOARD OF MIAMI-DADE COUNTY, FLORIDA (the "School Board"), pursuant to Rules 1.106 and 1.429, hereby submits this supplement to its August 30, 2004 petition (the "Petition") requesting the Commission to reconsider its dismissal of the above-captioned application pursuant to paragraph 263 of the *Report and Order and Further Notice of Proposed Rulemaking*, released on July 29, 2004, *In the Matter of Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, WT Docket No. 03-66.

The purpose of this supplement is to direct the Commission's attention to a decision by the Wireless Telecommunications Bureau ("WTB") that disposes of an argument against reconsideration raised in an opposition (the "Opposition") filed on September 13, 2004 by the School Board of Palm Beach County ("PBCSB") and WBSWP Licensing Corporation (the "Opponents"). In footnote 9 of the Opposition, the Opponents assert that the above-captioned application was unacceptable for filing because PBCSB's cochannel G-Group application for

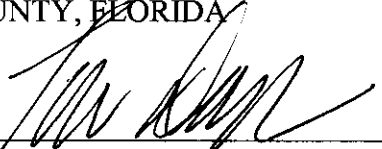
Boynton Beach, FL achieved cut-off status on July 7, 1995, which is before the date the above-captioned application was filed. The Opponents claim that the cut-off was established by the A-list cut-off notice issued for F-Group station KTB-84.

While the School Board has shown this argument to be meritless for other reasons, it has come to the School Board's attention that the WTB determined that the A-list cut-off notice in question did not provide the level of notice required by law and hence is without any effect. *School Board of Dade County*, DA 03-3668, ¶¶ 11-14 (rel. Nov. 19, 2003). A copy of this decision is attached. Accordingly, the Opponents' cut-off notice argument lacks the essential ingredient of a cut-off date.

The School Board also is resubmitting a copy of its Petition under cover of this supplement.

Respectfully submitted,

THE SCHOOL BOARD OF MIAMI-DADE
COUNTY, FLORIDA

By: 

Thomas J. Dougherty, Jr.
GARDNER, CARTON & DOUGLAS
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005
202-230-5164

Dated: January 6, 2005

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Application of)	
)	
SCHOOL BOARD OF DADE COUNTY)	File No. BMPLIF-950407DG
)	
To modify Florida Station KTB-84)	
To relocate Station KTB-84)	
Transmitter site from)	
Dade County to Broward County)	

MEMORANDUM OPINION AND ORDER

Adopted: November 13, 2003**Released: November 19, 2003**

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we address the School Board of Dade County, Florida's (School Board) minor change application¹ for Instructional Television Fixed Service (ITFS) Station KTB-84, Miami, Florida. The School Board proposes to relocate the transmission facilities for Station KTB-84 from Dade County (Miami) to Broward County (Ft. Lauderdale).² Additionally, we consider Wireless Broadcasting Systems of America, Inc.'s (WBS) Petition to Deny the minor change application.³ For the reasons discussed below, we deny the School Board's waiver request and direct the Licensing and Technical Analysis Branch to dismiss its application. Moreover, we will grant WBS' Petition.

II. BACKGROUND**A. Multi-channel Multipoint Distribution Service**

2. In 1983, the Commission reallocated the F channel group frequencies (i.e., channels F-1 through F-4) from ITFS to the Multipoint Distribution Services (MDS) on a nationwide basis to create multi-channel MDS (MMDS).⁴ The Commission determined that there were a substantial number of

¹ Application File No. BMPLIF-950407DG.

² See Petition at 2.

³ WBS, Petition to Deny (July 7, 1995) (Petition). The School Board filed its opposition on April 19, 1996. School Board of Dade County, Florida, Opposition to Petition to Deny (Apr. 19, 1996). WBS filed a reply on May 24, 1996. WBS Reply to Opposition to Petition to Deny (May 24, 1996).

⁴ Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, *Report and Order*, 94 F.C.C.2d 1203 ¶ 4 (1983) (*MMDS Allocation R&O*). The generic term MDS includes MMDS.

unused ITFS channels in many areas of the country, and it appeared likely that, while some growth in the ITFS service would occur, this growth was unlikely to exhaust the supply of channels.⁵ The Commission emphasized that one of the goals in redesignating the channels was the efficient utilization of spectrum.⁶ Consequently, the Commission concluded that two competitive MDS operators could offer multi-channel service while twenty channels would remain for existing and future ITFS use.⁷ Accordingly, the Commission prohibited the acceptance of new ITFS applications for the E and F Group channels that applicants filed after May 26, 1983.⁸

3. The Commission found that creating MMDS offers a number of public interest benefits including expanding consumer choice, creating lower cost equipment, and providing competition to other services which should lead both services to construct more quickly and provide better service at lower cost.⁹ Additionally, the Commission determined that redesignating the F Group for MDS would be least disruptive of the existing and potential uses of the 2500-2690 MHz band.¹⁰ However, the Commission did not require ITFS licensees operating on the F Group channels to stop using the F Group channels. In fact, the Commission "grandfathered" existing ITFS stations operating on the F Group channels with their authorized facilities.¹¹ Thus, all existing ITFS licensees (as well as permittees and applicants that eventually become licensees) operating on the F Group channels would be grandfathered in perpetuity.¹² Thus, although these grandfathered entities would have the ability to renew their ITFS licenses, and make pro forma assignments of their licenses,¹³ they would not have the ability to change transmitter location, antenna height, or transmission power.¹⁴ In addition, MDS facilities would not have to protect ITFS receive stations operating on the F Group channels that were added after May 26, 1983 against interference.¹⁵ Consequently, the Commission froze all facets of grandfathered ITFS operations as of May 26, 1983.¹⁶

⁵ *MMDS Allocation R&O*, 94 F.C.C.2d at 1206-07 ¶ 4.

⁶ Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, *Report and Order*, 98 F.C.C.2d 129 ¶ 12 (1984) (*MMDS Allocation MO&O on Recon*).

⁷ *MMDS Allocation R&O*, 94 F.C.C.2d at 1245 ¶ 105.

⁸ *Id.* ¶ 85.d; *see also* 47 C.F.R. § 74.902(c).

⁹ *Id.*

¹⁰ *MMDS Allocation R&O*, 94 F.C.C.2d at 1247-48 ¶ 110.

¹¹ *Id.* at 1236 ¶ 85.c.

¹² *Id.* at 1247-48 ¶ 110.

¹³ *Id.* at 1236 ¶ 85.c.

¹⁴ *MMDS Allocation MO&O on Recon*, 98 F.C.C.2d at 132-33 ¶ 12.

¹⁵ *Id.*

¹⁶ *Id.*

B. Competitive Bidding

4. In 1992, the Commission prohibited the filing of all applications for MDS channels.¹⁷ In 1994, the Commission determined that it would resolve any mutually exclusive applications for MDS by using competitive bidding.¹⁸ The Commission deferred the promulgation of specific rules until after it removed the prohibition on the filing of new applications.¹⁹ In June of 1995, the Commission adopted streamlined measures to distribute unused MDS spectrum for entire Basic Trading Area (BTA) service areas through competitive bidding.²⁰ The Commission required entities seeking to operate on MMDS channels to file a short-form application (FCC Form 175-M) during the short-form filing window.²¹ No other applications for MMDS spectrum was authorized. On November 13, 1995, the Commission held the auction for MDS spectrum.²² On March 29, 1996, the Commission completed its auction of authorizations to provide MDS.²³ WBS submitted the high bid for Market No. B469 (West Palm Beach-Boca Raton, Florida).²⁴ On August 16, 1996, the Commission granted WBS an MDS BTA authorization to operate on the F channel group in Market No. B469.²⁵

C. Grandfathered ITFS Station KTB-84

5. The School Board is the licensee of ITFS Station KTB-84, which has geographical coordinates of 25° 46' 30" North Latitude; 80° 11' 49" West Longitude. The School Board serves approximately 250 educational facilities throughout Dade County on Station KTB-84's grandfathered F channel group frequencies and other ITFS stations licensed to the School Board. Station KTB-84 operates on all four of its authorized F Group frequencies, five days per week, averaging more than five hours of programming per weekday per channel.²⁶

¹⁷ Amendment of Parts 1, 2, and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands, *Notice of Proposed Rulemaking*, 7 FCC Rcd 3266, 3270 ¶ 19 (1992). The Commission decided to accept applications to modify facilities from existing MDS licensees and conditional licensees as well as from entities eligible for ITFS. *Id.*

¹⁸ Implementation of Section 309(j) of the Communications Act - - Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2359 ¶ 62 (1994)

¹⁹ *Id.*

²⁰ Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, *Report and Order*, 10 FCC Rcd 9589, 9591 ¶¶ 1, 34 (1995).

²¹ *Id.* at 9648 ¶¶ 131-132.

²² Qualified Bidders and Bidding Instructions for November 13, 1995 Auction, Report No. AUC-95-06, *Public Notice*, 60 Fed. Reg. 58348 (1995).

²³ Winning Bidders in the Auction of Authorizations to Provide Multipoint Distribution Service in 493 Basic Trading Areas, *Public Notice*, Mar. 29, 1996.

²⁴ *Id.*

²⁵ FCC Announces Grant of MDS Authorizations, *Public Notice*, Aug. 16, 1996.

²⁶ See Opposition at 2.

6. On April 7, 1995, the School Board filed a major change application to relocate the station's transmission facilities from Dade County (Miami) to Broward County (Ft. Lauderdale).²⁷ The proposed transmitter site is in MDS BTA B293, Miami-Ft. Lauderdale.²⁸ In conjunction with the application, the School Board requested a waiver of the Commission's Rules to permit it to modify its operations.²⁹ Specifically, the School Board proposed to modify its facilities to change the transmitter carrier frequencies from nominal (zero off-set) to negative 10 kHz off-set, increase the station's transmitter power output, change the transmitting antenna, increase the transmitting antenna's height, and change the location of the station's transmitter site.³⁰ The School Board also sought a protected service area (PSA) for the station's proposed new location.³¹

7. On May 10, 1995, the Commission placed the application on public notice.³² The public notice indicated that the School Board was seeking to modify the B Group channels instead of the F Group channels. On May 15, 1995, the School Board supplemented its lease agreement³³ in support of its PSA request for the station. The School Board amended its application³⁴ on October 20, 1995. However, the School Board withdrew this amendment on April 11, 1996.³⁵

D. Waiver Request

8. Generally, the Commission does not permit ITFS licensees who operate stations on the "grandfathered" F Group frequencies to change transmitter location, antenna height, or transmitter power.³⁶ However, the School Board avers that its proposed modification will serve the public interest by providing efficient utilization of ITFS and MDS spectrum in the greater Miami metropolitan area, as well as promoting the wireless cable system that National Wireless Holdings, Inc. (National Wireless) is developing.³⁷ Therefore, the School Board has requested a waiver of the Commission's Rule in support of its application to modify its facilities and relocate the transmitter site as proposed.³⁸

²⁷ File No. BMPLIF-950407DG. Currently, the F Group channels are vacant. Petition at 2.

²⁸ See School Board's application; Section V, p.2.

²⁹ Application, Exhibit IV-4, FCC Form 330, Part IV, Question 4.

³⁰ See Petition at 2; Opposition at 2.

³¹ See School Board's Application, Section V, p. 9.

³² Public Notice, Report No. A-35a, Appendix (May 10, 1995) (*Application Public Notice*).

³³ See School Board's application amended.

³⁴ File No. BMPLIF-951020R5 (See Report No. 23631A, released Nov. 9, 1995).

³⁵ See Letter from the School Board to William F. Caton, Acting Secretary of the Federal Communications Commission, dated April 11, 1996.

³⁶ *MMDS Allocation MO&O on Recon*, 98 F.C.C. 2d at 132-33 ¶ 12.

³⁷ See School Board's application; Exhibit IV-4, at 1. The School Board provides no further information regarding National Wireless' system.

³⁸ Opposition at 2.

9. The School Board seeks a waiver of Section 74.902(c) to further its educational mission by enhancing educational programming to the elementary, secondary, and college-credit educational institutions in south Florida.³⁹ To accomplish this mission, the School Board proposes substantial modifications to its authorized transmission facilities and relocation of its transmitter site to another county. The School Board argues that the relocation of Station KTB-84's transmitter site to geographical coordinates of 26° 05' 09" North Latitude; 80° 14' 08" West Longitude will permit it to provide programming into areas of Broward County that are beyond the reach of its existing transmission facilities in Dade County.⁴⁰

10. On July 7, 1995, WBS filed a petition to deny the application. WBS asserts that it is developing a wireless cable system in West Palm Beach, Florida.⁴¹ Furthermore, WBS asserts that granting the School Board's application and waiver request will prejudice WBS' ability to apply for and acquire those channels.⁴² On April 19, 1996, the School Board opposed the Petition by asserting that WBS did not have standing to object to the application.⁴³

III. DISCUSSION

A. Procedural Matters

1. Notice

11. WBS alleges that in order to provide proper notice of the application, the Commission must consider whether to place the School Board's application on a new cut-off list as an F Group filing.⁴⁴ WBS notes that the School Board's application, BMPLIF-950407DG, which appeared on Public Notice⁴⁵ stated that the application was for the B Group. WBS asserts that we must place the application on public notice with the F Group channels listed to correct this error.⁴⁶

12. The Communications Act of 1934, as amended (the Act), prohibits the granting of an application earlier than thirty days following issuance of public notice of the acceptance for filing of such application.⁴⁷ During this thirty-day period, interested parties may file a petition to deny the application.⁴⁸ WBS alleges the notice given for this application was deficient because the *Application Public Notice*

³⁹ *Id.*

⁴⁰ See School Board's application; Exhibit IV-4, p.1

⁴¹ Petition at 3.

⁴² *Id.*

⁴³ Opposition at 3.

⁴⁴ Petition, n.1.

⁴⁵ See Petition at 1 (Report No. A-35a, released on May 10, 1995).

⁴⁶ Petition, n.1.

⁴⁷ 47 C.F.R. § 309(b).

⁴⁸ 47 C.F.R. § 309(d)(1).

incorrectly listed the B channel group instead of the F channel group as the channels the School Board sought to modify. The standard for determining adequate notice is whether the *Application Public Notice* was "reasonably comprehensible to people of good faith."⁴⁹ That is, would a fair reading of the *Application Public Notice* have put the reader on notice that the Commission had accepted an application for filing for authority to provide service on the F block MMDS channels in Broward County.⁵⁰

13. In a prior case in which an entity complained of inadequate notice, the Commission acknowledged that although neither the Act nor the Commission's Rules specified the exact contents of a public notice, it examined the past practice of the designated entity in determining the adequacy of the notice.⁵¹ Upon review of the Common Carrier Bureau's practice of including the file number, applicant name, call sign (if any), nature of the application, frequency and location of the facility; the Commission determined that a public notice that did not include the location and frequency information did not contain sufficient information to comply with Section 309(b) of the Act as interpreted by the Common Carrier Bureau over many years.⁵²

14. When placing an application on public notice as accepted for filing, the former Mass Media Bureau included the file number, applicant name, call sign (if any), nature of the application, frequency and location of the facility.⁵³ In light of the former Mass Media Bureau's practice of including the channel group in the public notice, we find that the public notice did not contain sufficient information to comply with Section 309(b) of the Act as interpreted by the former Mass Media Bureau over many years. Ordinarily, we would issue an erratum to the Public Notice to correct the frequency from the B to the F channel group, however, in light of our denial of the waiver request, we ultimately find such action to be unnecessary under the circumstances presented.

2. Standing

15. The Act as implemented by the Commission's Rules permits only a party in interest to protest an application before the Commission.⁵⁴ WBS asserts two reasons for denial of the School Board's application. First, as noted above, WBS alleges the *Application Public Notice* did not provide adequate notice. Second, WBS asserts that it would not be able to obtain the channels if we granted the School Board's application. WBS does not assert that it is an applicant nor a licensee. In such cases, an entity that expects to file an application in the future is also without standing because such a claim of potential economic injury is too remote and speculative to show standing as a party in interest.⁵⁵ However, we find that WBS does have standing to enforce the right to public notice, which the Act explicitly guarantees to participants to agency actions.

⁴⁹ *Radio Athens, Inc. v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968).

⁵⁰ *Mobilfone of Northeastern Pennsylvania, Inc., Memorandum Opinion and Order*, 5 FCC Rcd 7414 (CCB 1990).

⁵¹ *Central Mobile Radio Phone Service, Memorandum Opinion and Order*, 41 Rad. Reg. 2d 431 ¶ 9 (1977).

⁵² *Id.*

⁵³ See *Application Public Notice*.

⁵⁴ 47 U.S.C. § 309(d)(1); 47 C.F.R. § 74.912(a) (1995); 47 C.F.R. § 21.957(a) (1995).

⁵⁵ See e.g. *KIRV Radio*, 50 FCC2d at 1010 ¶ 2.

B. Substantive Matters

1. School Board's Application

16. When the School Board filed its application, the Commission permitted the filing of major change applications only on dates it specified.⁵⁶ The Commission specified these filing dates in a public notice at least sixty days before the commencement of the filing period.⁵⁷ The Commission considered a major change for an ITFS station to be any proposal to add new channels, change from one channel (or channel group) to another, change polarization, increase the Effective Isotropic Radiated Power (EIRP) in any direction by more than 1.5dB, increase the transmitting antenna height by twenty-five feet or more or relocate a facility's transmitter site by ten miles or more.⁵⁸ In this case, the School Board asserts that its proposal to modify its facilities to change the transmitter carrier frequencies from nominal (zero off-set) to negative 10 kHz off-set, increase the station's transmitter power output, change the transmitting antenna and decrease its height, and change the location of the station's transmitter site⁵⁹ constitutes a minor change. We disagree.

17. The School Board is licensed to operate from the transmitter site specified by the geographical coordinates of 25° 46' 30 " North Latitude; 80° 11' 49 " West Longitude with a transmitting antenna center of radiation element at 162.5 meters above mean sea level and a calculated EIRP of 21.2 dBw (131.83 watts). The School Board's proposal is to operate at a site defined by the coordinates 26° 05' 09 " North Latitude; 80° 14' 08 " West Longitude with a transmitting antenna center of radiation element at 77.44 meters above mean sea level and a calculated EIRP of 27.99 dBw (629.46 watts). Accordingly, the School Board proposes to operate from a transmitter site 21.53 miles (34.65 kilometers) 353.6° T of its licensed site, with its EIRP increased from 21.2 dBw (131.83 watts) to 27.99 dBw (629.46 watts), an increase in power of 6.79 dBw or 497.63 watts. The School Board also proposes to change the polarity of the radiated signal from a horizontal to a vertical polarization and modify the transmitter carrier frequency from nominal (zero off-set) to negative 10 kHz off-set. By modifying the station's carrier frequency from nominal to negative 10 kHz off-set, the School Board reduces the co-channel desired-to-undesired signal interference ratio from 45 to 28 dB.⁶⁰

⁵⁶ 47 C.F.R. § 74.911(c)(1) (1995).

⁵⁷ *Id.*

⁵⁸ 47 C.F.R. § 74.911(a)(1) (1995).

⁵⁹ See Petition at 2; Opposition at 2.

⁶⁰ Further, based on our independent analysis, it appears that the licensed operation of Station KTB84 causes theoretical co-channel interference, less than 45 dB co-channel interference criterion, to the 35-mile protected service area (PSA) of Station KNSD365, Boynton Beach, FL, licensed to WBSWP Licensing Corp. The area of interference is defined by an arc starting at 70° to 300° T (230°) from Station KNSD365's transmitter site. The analysis further shows, however, that the Board's proposed transmission facilities would eliminate the theoretical interference caused to Station KNSD365's 35-mile PSA. On the other hand, if the frequency off-set is not accepted, the Board's proposal would cause theoretical interference to Station KNSD365's PSA over an arc 140° to 260° T (120°) from Station KNSD365's transmitter site.

2. Waiver

18. In light of the School Board's modification application to authorize ITFS facilities on the F Group channels in Broward County, we must determine whether to grant a waiver of the Commission's prohibition against the authorization of new ITFS facilities on the F Group channels. An applicant seeking a waiver faces a high hurdle and must plead the facts and circumstances which warrant a waiver.⁶¹ Furthermore, an applicant for a waiver must articulate a specific pleading, and adduce concrete support, preferably documentary.⁶² Accordingly, we may grant a waiver of the Commission's rules under two scenarios. First, a grant of a waiver is appropriate when the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest.⁶³ In the alternative a grant of a waiver is appropriate when in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.⁶⁴

19. The Commission prohibited all but pro forma assignments of grandfathered ITFS licenses because it sought to reserve the redesignated channels for MDS use, as well as to avoid receiving mutually exclusive, fundamentally different applicants for the same channel.⁶⁵ Moreover, the Commission averred that the prohibition was consistent with the purpose of a grandfather provision, which is to protect specific interests of the public and of operating stations.⁶⁶ The Commission explained that grandfathering provisions protect the public against disruptions in existing service while protecting the reliance interest of the operating station in the spectrum allocated and from economic dislocation.⁶⁷ Additionally, the Commission indicated that it would consider any waiver requests, preferably submitted on a joint basis by existing ITFS licensees and MDS permittees in the F group, seeking to show that a modification of a grandfathered ITFS licensee in the F group would result in more efficient spectrum utilization.⁶⁸

20. Based upon our review of the record before us, we find that the School Board's application and waiver request fails to make a sufficient showing that a waiver of Section 74.902 of the Commission's Rules is warranted under the circumstances presented. As noted above, the Commission

⁶¹ *WAIT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*) aff'd, 459 F.2d 1203 (1972) cert. denied, 409 U.S. 1027 (1972) citing *Rio Grand Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (d.C. Cir. 1968); *Birach Broadcasting Corporation, Memorandum Opinion and Order*, 18 FCC Rcd 1414 (2003).

⁶² *Fresno MMDS Assoc., Memorandum Opinion and Order*, FCC 03-145, (rel. Jul. 14, 2003) citing *WAIT Radio*, 413 F.2d at 1157 n.9; *Family Stations, Inc. v. Directv, Inc., Memorandum Opinion and Order*, 17 FCC Rcd 25,333 ¶ 7 (MB 2002).

⁶³ 47 C.F.R. § 21.19(a).

⁶⁴ 47 C.F.R. § 21.19(b).

⁶⁵ *MMDS Allocation MO&O on Recon*, 98 FCC2d at 132-33 ¶ 12.

⁶⁶ *Id.* ¶ 14.

⁶⁷ *Id.*

⁶⁸ See *MMDS Reallocation MO&O on Recon*, 98 F.C.C.2d at 133 n.7.

reallocated the F Group channels to provide more channels for the increased demand for MDS use.⁶⁹ The School Board, however, does not provide any information that would support a finding that its proposal would serve the underlying purpose of the rule. In fact, the School Board provides a general statement that its proposal will provide *efficient utilization* of the spectrum in the greater Miami metropolitan area, and promote a wireless cable system of another entity.⁷⁰ We find such statement alone without empirical data to support the assertion to be unpersuasive and not sufficient to satisfy the high hurdle articulated in *WAIT Radio*.⁷¹

21. Further, the School Board has not demonstrated any unique or unusual factual circumstances that would warrant grant of a waiver. Although we applaud the School Board's attempt to further its educational mission in south Florida, the School Board has not provided any information that would distinguish it from any other school system seeking to enhance its educational programming. Moreover, allowing the School Board to relocate to MMDS channels at this juncture to provide ITFS services would appear to be counter to the Commission's intent to provide additional spectrum for MMDS. Although this proposed modification is contrary to the Commission's intent, the School Board has not provided any information that would show that application of Section 74.902(c) would be inequitable, unduly burdensome, or contrary to the public interest. Finally, the School Board has not shown that it has no other alternatives for enhancing the educational programming.

IV. CONCLUSIONS

22. We find that the School Board has not submitted sufficient reasons in support of its request for waiver in connection with its proposal to modify the facilities for Station KTB-84, including relocation of the transmitter site from Dade County (Miami) to Broward County (Ft. Lauderdale). Accordingly, we will deny the waiver request and direct the Licensing and Technical Analysis Branch to dismiss the application. Finally, we grant WBS' Petition to Deny.

V. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communication Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 21.19 of the Commission's Rules, 47 C.F.R. § 21.19, that the waiver request filed by the School Board of Dade County on April 7, 1995 IS DENIED.

24. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communication Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 73.3566 of the Commission's Rules, 47 C.F.R. § 73.3566, that we direct the Licensing and Technical Analysis Branch to DISMISS the School Board of Dade County's application File No. BMPLIF-950407DG filed on April 7, 1995.

⁶⁹ See MMDS Reallocation MO&O, 98 F.C.C.2d at 1223-24, ¶ 51.

⁷⁰ See School Board's Application; Exhibit IV-4. Emphasis added.

⁷¹ MMDS Reallocation MO&O on Recon, 98 F.C.C.2d at 133 n.7.

25. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 309 and Section 21.30 of the Commission's Rules that the petition to deny filed by Wireless Broadcasting Systems of America, Inc. on July 7, 1995 IS GRANTED.

26. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau

GCD**Gardner Carton & Douglas**

1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005-3317

Tel 202 230 5000 | Fax 202 230 5300
www.gcd.com

Chicago, IL
Milwaukee, WI
Albany, NY

Thomas J. Dougherty, Jr.
202/230-5164
tdougherty@dc.gcd.com

August 30, 2004

Via Hand Delivery

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: WIRELESS TELECOMMUNICATIONS BUREAU,
BROADBAND DIVISION

Petition for Reconsideration of Dismissal of
Application for Modification of ITFS Station
KTB85 (BMPLIF-19950915HW); WT Dkt. 03-66

Dear Ms. Dortch:

Transmitted herewith, on behalf of The School Board of Miami-Dade, Florida, is an original and eleven copies of its petition for reconsideration of the dismissal of its above-referenced application. This application was dismissed pursuant to paragraph 263 of the *Report and Order and Further Notice of Proposed Rulemaking*, released on July 29, 2004, *In the Matter of Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, WT Docket No. 03-66. As this involves a decision in that rule making proceeding, we are also filing this petition electronically.

Please contact the undersigned if you having any questions concerning this petition.

Respectfully submitted,


Thomas J. Dougherty, Jr.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of Application of)	
)	
THE SCHOOL BOARD OF MIAMI-)	File No. BMPLIF-19950915HW
DADE COUNTY, FLORIDA)	
)	
For Authorization to Modify Facilities)	
of ITFS Station KTB-85, Miami, Florida)	

Directed To: The Commission

PETITION FOR RECONSIDERATION

THE SCHOOL BOARD OF MIAMI-DADE COUNTY, FLORIDA (the "School Board"), pursuant to Rules 1.106 and 1.429, hereby requests the Commission to reconsider its dismissal of the above-captioned application pursuant to paragraph 263 of the *Report and Order and Further Notice of Proposed Rulemaking*, released on July 29, 2004, *In the Matter of Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, WT Docket No. 03-66 (the "*Rebanding Report and Order*").

In support of this request, the following is respectfully submitted:

I. BACKGROUND

The School Board provides public education in Miami-Dade County, Florida. As a part of its educational mission, the School Board has employed ITFS facilities for years. It holds licenses to operate ITFS Stations WHA-956 on the A-Group, WHG-230 on the C-Group, and

KTB-84 and KTB-85 on the F-Group in Miami, Florida. ITFS is critical to the School Board's ability to educate over 400,000 students.¹

In furtherance of its goals, on September 15, 1995 the School Board filed the above-captioned modification application (the "Miami-Dade Application") seeking authority to, *inter alia*, change the authorized location of KTB-85 transmitting facilities (and, as a result, its protected service area or "PSA") and change the station's channels from F-Group to G-Group. A grant of this application would eliminate one of the few "grandfathered" ITFS stations; that is, those operating on MDS E- or F-Group channels.

In this time frame, the School Board's sister agency, The School Board of Palm Beach County, Florida (the "Palm Beach School Board"), filed an application to increase the power and make other changes to its cochannel station KZB-29, at Riviera Beach, Florida (File No. BMPLIF-950524DM) (the "Palm Beach Application"). The Palm Beach School Board amended the application on September 15, 1995. The amendment reduced the proposed antenna height "in order to protect the protected service area (PSA) requested by the Miami applicants"² The amendment included shadow studies showing that the signal of the modified Riviera Beach station would not intrude into the 15-mile PSA proposed by the Miami applications.³ In addition,

¹ <http://www.dadeschool.net>.

² Amendment, at page 1 of Engineering Statement. The Commission announced the acceptance for filing of both applications by *Public Notice*. Rep. No. 23836C, rel. Sep. 30, 1996.

³ While the rules were changed to change the PSA from a formula that provided a 15-mile radius PSA for omnidirectional stations to a 35-mile radius, the 15-mile radius PSA continued to apply to applications filed before September 18, 1995. *Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 11 F.C.C. Rcd. 17003, para. 5 (1996).

the amendment voluntarily proposed carrier offset to “reduce the interference received from Miami.”⁴

In the *Rebanding Report and Order*, the Commission decided to dismiss all mutually-exclusive ITFS applications, rather than decide which should be granted and which should be denied.⁵ The Miami-Dade Application is listed on Appendix E of the *Rebanding Report and Order* as a dismissed application. Pending applications that were subject of a qualified settlement agreement were not dismissed.

Mutually-exclusive applications were not the only dismissed applications. The *Rebanding Report and Order* also ordered the Wireless Telecommunications Bureau to dismiss “all pending applications to modify MDS and ITFS stations, except for modification applications that could change an applicant’s PSA, or applications for facilities that would have to be separately applied for under the rules we adopt today.”⁶ The reason for this decision was that the adoption of the geographic service area concept eliminated the need for these applications.⁷

The Palm Beach County Application would be properly dismissed under this test. It proposed a modified facility at the currently authorized site and, accordingly, its grant would not change its PSA. Its other proposed changes are of the type that would not require an application under the new GSA rules. In fact, the only modifications requested by the Palm Beach County School Board application are a reduction in the existing antenna height from 321.5 to 305 feet, and the addition of carrier offset. Accordingly, the Palm Beach County School Board application

⁴ Amendment, at page 1 of Engineering Statement.

⁵ Para. 263.

⁶ *Rebanding Report and Order*, at para. 58.

⁷ *Id.*

should be dismissed. The Miami-Dade Application, by contrast, proposes a change of transmitter site and, as a result, a change in the PSA. It would not for that reason be dismissed under the *Rebanding Report and Order* as unnecessary under the new GSA rules.

II. DISCUSSION

As explained below, there are very unique and compelling circumstances justifying the reconsideration of the decision of the Commission to dismiss the Miami-Dade Application.

A. The Dismissal of the Palm Beach County School Board Application Eliminates Mutual-Exclusivity, if any, that Would Otherwise Require Dismissal of the Miami-Dade Application.

Assuming for the sake of discussion that the Miami and Palm Beach applications in fact were in electrical conflict, that conflict is eliminated by the decision in the *Rebanding Report and Order* to dismiss pending applications that propose neither a PSA change nor facilities that would require separate authorization under the new GSA rules. The Palm Beach Application fits that description. All it requests is a reduction of existing antenna height and authorization of carrier offset. Clearly no authorization is required to make those changes under the GSA rules.⁸ Since the Palm Beach Application must be dismissed, the Miami-Dade Application cannot be considered – and indeed is not -- mutually-exclusive.⁹ It, thus, is similarly situated to other non-

⁸ Under Rule 27.1209(b)(1), separate authorization for a system modification is required only if international agreements require coordination, Rule 1.1307 requires the filing of an environmental assessment to implement the modification, or the modified station would affect a radio quiet zone under Rule 1.924.

⁹ The Commission does not apply mutually exclusive selection procedures involving applications that are not eligible for grant. *See, e.g., Turner Independent School District*, 8 F.C.C. Rcd. 3153, 3153 (1993). This change of rules eliminated eligibility for this type of application, or the ability to claim interference protection under the old rules. The Commission's authority to establish eligibility standards by general rule may be exercised even where

mutually-exclusive applications, which the Commission has decided to grant. Accordingly, the Miami-Dade Application can and should be processed separate from the Palm Beach Application.¹⁰

B. Dismissal of the Miami-Dade Application in These Circumstances Would Not Serve the Public Interest

Setting aside for the moment the fact that the Miami-Dade Application cannot logically be considered mutually-exclusive with an application subject to dismissal, in the unique circumstances presented by this case grant of the Miami-Dade Application would create no impairment to the Palm Beach GSA under the new rules, and, for that reason as well, it makes no sense to consider these applications mutually-exclusive. The core to the concept of application mutual-exclusivity is that one proposal limits or precludes another. Under the old rules, mutual-exclusivity was deemed to exist when the grant of one application would result in facilities causing electrical interference to the other proposed station. That definition, however, is inappropriate in these unique circumstances. With the change in rules, what is at stake are GSAs, not PSAs.¹¹ In this particular case, the grant of a GSA to one of the applicants does not impair the GSA granted to the other applicant. The reason is the unique circumstance that results where, as here, the GSA overlap splitting rule is applied to two proposals separated by an

qualification changes disqualify pending applicants, thereby denying them hearing rights they might have otherwise enjoyed. *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

¹⁰ It is a maxim of administrative law that agencies are required to treat similarly situated applicants in a similar fashion. *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

¹¹ Rule 27.1209(b). Indeed, the *Rebanding Report and Order* instructs the Wireless Telecommunications Bureau to dismiss pending ITFS applications for facilities changes that could be accomplished without prior authorization under the GSA rules.

existing cochannel station.¹² Specifically, the Miami-Dade and Palm Beach County proposals are for different geographic areas on either side of existing cochannel station KTZ22, licensed to Broward County School Board at Fort Lauderdale, Florida. The need for each of the Miami and Palm Beach G-Group stations to split GSAs with KTZ22 means that Palm Beach County's G-Group proposal does not present any limitation on the GSA available to the Miami-Dade G-Group station, and the Miami-Dade County G-Group proposal does not present any limitation on the GSA available to Palm Beach County G-Group station. Each of the Miami-Dade and Palm Beach County applicants receives the same GSA regardless of whether the other's proposal is licensed. This situation is depicted on Exhibit A to this petition. To consider the two modification applications mutually-exclusive in this rare, and probably unique, circumstance would make no sense.

C. Grant of the Application Would Eliminate One of the Few Grandfathered F-Group ITFS Stations

The Miami-Dade Application requests authorization to change authorized F-Group ITFS station KTB85 to G-Group channels. KTB85 is one of the few "grandfathered" ITFS stations in the country. The existence of grandfathered ITFS stations on E- and F-Group channels has been a thorny issue since the E- and F-Group channels were reallocated to MDS in 1983. Reduced to its most fundamental level, the problem is determining how MDS and ITFS stations operating on the same channels in the same areas can coexist without destructive interference. No one has been able to resolve this problem in the 21 years since this reallocation decision. While the rebanding of the MDS and ITFS frequencies would seem to offer new opportunities to resolve

¹² Rule 27.1206(a)(1).

this dilemma, the Commission was not able to develop a solution. Instead, the *Rebanding Report and Order* contains a NPRM that asks for further comment on the issue.

In discussing the issue, the NPRM portion of the *Rebanding Report and Order* asks for comments on a series of proposals that are “zero sum” outcomes; that is, either the educator loses channels or protected status or the commercial licensee loses channels or protected status.¹³ None of the proposals presented in the NPRM portion of the *Rebanding Report and Order* would resolve the problem to the satisfaction of all concerned interests, thus reflecting the continuing complexity of the issue.

Grant of the Miami-Dade Application would change KTB85 from grandfathered F-Group channels to G-Group channels, thus eliminating one of the few grandfathered ITFS stations in a “win – win” manner. Denying the Miami-Dade Application would cast aside this one unique opportunity to eliminate a grandfather ITFS station situation and leave to another day the issue of how KTB85 and cochannel MDS stations in Miami will coexist. Clearly, the public interest favors the former.

¹³ *Rebanding Report and Order*, at ¶¶ 333-343.

III. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, THE SCHOOL BOARD OF MIAMI-DADE COUNTY, FLORIDA requests that the Commission return the above-captioned application to pending status and process the application.

Respectfully submitted,

THE SCHOOL BOARD OF MIAMI-DADE
COUNTY, FLORIDA

By: 

Thomas J. Dougherty, Jr.
GARDNER, CARTON & DOUGLAS
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005
202-230-5164

Dated: August 30, 2004

EDX SignalPro™: KTB85 to KZB29

MILES

-5 0 20

BellSouth

KTZ22/ Fort Lauderdale GSA

20040827

Exhibit A

Palm

Broward County

KTZ22 GSA

Dade County

KTB85 GSA

CERTIFICATE OF SERVICE

I, Suzi Natal of Gardner Carton & Douglas LLP hereby certify that I caused a true copy of the foregoing Petition for Reconsideration to be sent to the following person this 30th day of August, 2004, by U.S. First Class Mail, postage pre-paid:

Paul H. Brown, Esq.
Wood Maines & Brown, Chartered
1827 Jefferson Place, N.W.
Washington, D.C. 20036

Jennifer Richter, Esq.
Morrison & Foerster, LLP
2000 Pennsylvania Avenue, N.W. Suite 5500
Washington, D.C. 20006



Suzi Natal

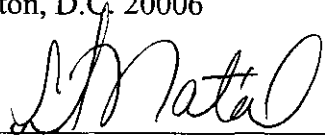
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CERTIFICATE OF SERVICE

I, Suzi Natal of Gardner Carton & Douglas LLP hereby certify that I caused a true copy of the foregoing Petition for Reconsideration to be sent to the following person this 6th day of January, 2005 by U.S. First Class Mail, postage pre-paid:

Paul H. Brown, Esq.
Wood Maines & Brown, Chartered
1827 Jefferson Place, N.W.
Washington, D.C. 20036

Jennifer Richter, Esq.
Morrison & Foerster, LLP
2000 Pennsylvania Avenue, N.W. Suite 5500
Washington, D.C. 20006



Suzi Natal